

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ORDER

Pending before the Court is the Motion for Summary Judgment, (ECF Nos. 4, 8), filed by Defendant The Shops at Summerlin North, LP (“Defendant”). Plaintiff MTO Summerlin LLC (“Plaintiff”) filed a Response, (ECF No. 15), and Defendant filed a Reply, (ECF Nos. 25, 27).

Also pending before the Court is Plaintiff's Countermotion for Federal Rule of Civil Procedure ("Rule") 56(d) Discovery, (ECF No. 18). Defendant filed a Response, (ECF Nos. 26, 28), and Plaintiff filed a Reply, (ECF No. 35).

Also pending before the Court are Defendant's Motion to Redact and Seal its Motion for Summary Judgment, (ECF No. 7), and Motion for Leave to File Redacted Reply in Support of Motion for Summary Judgment and Redacted Response to Plaintiff's Motion for Rule 56(d) Discovery,¹ (ECF No. 24).

¹ Local Rule IA 10-5(a) provides that “papers filed with the court under seal must be accompanied by a motion for leave to file those documents under seal.” L.R. IA 10-5(a). While Defendant filed a sealed Reply, (ECF No. 27), and a sealed Response, (ECF No. 28), Defendant did not file motions seeking leave to seal those documents. Thus, the Court will construe Defendant’s Motion for Leave to File Redacted Reply in Support of Motion for Summary Judgment and Redacted Response to Plaintiff’s Motion for Rule 56(d) Discovery, (ECF No. 24), as a motion to seal its Reply, (ECF No. 27), and Response, (ECF No. 28).

1 **I. BACKGROUND**

2 This case arises from a commercial lease dispute. (Mot. Summ. J. (“MSJ”) 2:5, ECF No.
3 8). Plaintiff is a tenant operating MTO Café in Downtown Summerlin, a commercial
4 development located in Las Vegas, Nevada. (*Id.* 2:5–6); (*see* Resp. 2:21–24, ECF No. 15).
5 Defendant owns the retail mall area of Downtown Summerlin and is Plaintiff’s landlord. (MSJ
6 2:6–7); (*see* Resp. 2:4–6). In 2014, Defendant and Plaintiff entered into a commercial lease
7 contract (“MTO Lease”) containing an exclusive use provision (“Exclusive Use Provision”),
8 which states in pertinent part:

9 In the event Landlord shall lease, after the Effective Date, space in the area of the
10 Shopping Center bounded by the following roads: north of Sage Park Drive,
11 south of Summerlin Centre Drive, west of Summa Drive and east of Pavilion
12 Center Drive, to an occupant other than Tenant primarily operating as a full-
13 service (i.e., table service, orders taken by waitstaff and food delivered to the
14 table) restaurant offering primarily a breakfast menu throughout the entire day
15 with menus similar to tenants currently operating as Egg and I, Broken Yolk,
16 Hash House a Gogo, Waffle House, The Eggworks, Bagel Café or similar
17 establishments (the “Permitted Merchandise”) (i) such circumstance shall not
18 constitute a breach or default by Landlord hereunder; and (ii) Tenant may, after
19 written notice to Landlord and Landlord’s failure, within sixty (60) days after
20 Landlord’s receipt of such notice, to cause such other occupant(s) to cease
21 offering such Permitted Merchandise for retail sale, reduce the then-effective
22 Minimum Annual Rental otherwise payable hereunder by fifty percent (50%).

23 (MTO Lease, art. VI § 6.04(a), Ex. B to MSJ, ECF No. 9); (Resp. 3:14–28).

24 In December 2017, Makers & Finders Coffee, a restaurant serving breakfast food and
25 other food and beverage items, opened in the retail mall area of Downtown Summerlin. (Resp.
26 4:11–5:3); (MSJ 4:18). On January 25, 2018, Plaintiff gave notice to Defendant under the
27 Exclusive Use Provision of the MTO Lease, claiming that the menu of Makers & Finders
28 Coffee implicates the restrictions on the Permitted Merchandise, and advised of its intent to
29 reduce its rent by 50 percent. (Resp. 5:23–6:1). However, Defendant did not grant the rent
30 reduction. (*See id.* 15:21–24)

1 On April 4, 2018, Plaintiff filed its Complaint in Clark County District Court, alleging
2 the following claims: (1) declaratory relief “pursuant to NRS Chapter 30,” Uniform Declaratory
3 Judgment Act; (2) breach of contract; (3) breach of the implied covenant of good faith and fair
4 dealing; and (4) unjust enrichment. (*See* Compl. 3:10–6:25, 7:9–10, ECF No. 1-2). On April
5 23, 2018, Defendant removed to the District of Nevada invoking the Court’s diversity
6 jurisdiction. (Notice of Removal ¶¶ 4–8, ECF No. 1). On April 27, 2018, Defendant moved for
7 summary judgment. Plaintiff subsequently filed a Countermotion for Rule 56(d) Discovery.

8 **II. DISCUSSION**

9 The Court will first address Defendant’s Motion for Summary Judgment and Plaintiff’s
10 Countermotion for Rule 56(d) Discovery. The Court will next consider Defendant’s Motions to
11 Seal. Lastly, the Court will address its subject matter jurisdiction over the instant case.

12 **A. Summary Judgment**

13 ***I. Legal Standard***

14 The Federal Rules of Civil Procedure provide for summary adjudication when the
15 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
16 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
17 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
18 may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
19 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable
20 jury to return a verdict for the nonmoving party. *See id.* “Summary judgment is inappropriate if
21 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
22 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
23 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
24 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
25 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

1 In determining summary judgment, a court applies a burden-shifting analysis. “When
2 the party moving for summary judgment would bear the burden of proof at trial, it must come
3 forward with evidence which would entitle it to a directed verdict if the evidence went
4 uncontested at trial. In such a case, the moving party has the initial burden of establishing
5 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
6 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
7 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
8 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
9 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
10 party failed to make a showing sufficient to establish an element essential to that party’s case
11 on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–
12 24. If the moving party fails to meet its initial burden, summary judgment must be denied and
13 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
14 398 U.S. 144, 159–60 (1970).

15 If the moving party satisfies its initial burden, the burden then shifts to the opposing
16 party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v.*
17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
18 the opposing party need not establish a material issue of fact conclusively in its favor. It is
19 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
20 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
21 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
22 summary judgment by relying solely on conclusory allegations that are unsupported by factual
23 data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
24 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
25 competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

1 At summary judgment, a court’s function is not to weigh the evidence and determine the truth
2 but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The
3 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in
4 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
5 significantly probative, summary judgment may be granted. *See id.* at 249–50.

6 **2. Analysis**

7 Defendant moves for summary judgment arguing, *inter alia*, that Makers & Finders
8 Coffee does not implicate the Exclusive Use Provision because it is “not ‘primarily’ a breakfast
9 establishment as it serves a handful of breakfast and lunch items simultaneously from its
10 opening until 3:00 in the afternoon. Notably, the breakfast and lunch items are secondary to the
11 coffee service—because Makers & Finders Coffee is a coffee shop.” (MSJ 9:26–28, ECF
12 No. 8) (emphasis removed) (citation omitted). Defendant further argues that Makers & Finders
13 Coffee “is not even located within the geographic area described” in the Exclusive Use
14 Provision, and therefore the opening of Makers & Finders Coffee does not implicate the
15 provision. (*Id.* 9:7–9).

16 Plaintiff responds that Makers & Finders Coffee primarily offers a breakfast menu
17 throughout the entire day with menus similar to MTO Café’s and other businesses identified as
18 examples in the MTO Lease. (Resp. 11:5–7, ECF No. 15). As such, Makers & Finders Coffee
19 implicates the Exclusive Use Provision. (*See id.*). Plaintiff also counters that the geographic
20 description provided in the Exclusive Use Provision is a result of a mutual mistake as “no plot
21 of land could simultaneously be east of Pavilion Center Drive and west of Summa Drive[.]” (*Id.*
22 12:19–13:2). In addition to these arguments, and others which the Court need not address at
23 this time, Plaintiff countermoves pursuant to Rule 56(d), asserting that further discovery is
24 warranted and that Defendant’s Motion for Summary Judgment “was made prematurely.”
25 (Countermot. 2:2–4, ECF No. 18).

1 Rule 56(d) provides that, prior to the entry of summary judgment, the opposing party
2 must have sufficient opportunity to discover information essential to its position. Fed. R. Civ.
3 P. 56(d); *see also Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641,
4 645 (9th Cir. 1981) (“Implicit in the opportunity to respond is the requirement that sufficient
5 time be afforded for discovery necessary to develop facts essential to justify a party’s
6 opposition to the motion [for summary judgment].”). Under Rule 56(d), “[i]f a nonmovant
7 shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to
8 justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time
9 to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate
10 order.” Fed. R. Civ. P. 56(d).

11 Here, Plaintiff argues, with support from an affidavit, that discovery of certain issues
12 would be necessary in order to fully articulate its opposition to Defendant’s Motion for
13 Summary Judgment. (Puoy Aff. ¶¶ 3–5, ECF No. 18). Plaintiff argues that such issues include
14 “the parties’ intentions regarding the geographic radius,” “the sales of Makers and Finders,”
15 and whether “Makers and Finders [has] a kitchen that serves breakfast,” among others. (*Id.*).
16 Plaintiff further explains that several terms within the Exclusive Use Provision are susceptible
17 to more than one reasonable interpretation. (*See generally* Plf.’s Reply 7:24–14:22, ECF No.
18 35). Therefore, it seeks to conduct discovery regarding the intention of the parties in order to
19 determine whether Makers & Finders Coffee “meets the definition in the exclusive use
20 provision.” (*Id.* 14:23–15:22).

21 The Court finds that further discovery is warranted in this case. Indeed, Defendant
22 moved for summary judgment less than one month after Plaintiff filed its Complaint. As such,
23 Plaintiff has not had sufficient opportunity to discover information essential to its position.
24 Accordingly, the Court **DENIES** Defendant’s Motion for Summary Judgment, (ECF Nos. 4, 8),
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1 without prejudice as premature. Further, the Court **GRANTS** Plaintiff's Motion for Rule 56(d)
2 Discovery, (ECF No. 18), so that the parties can proceed with discovery in this case.

3 **B. Defendant's Motions to Seal**

4 Generally, the public has a right to inspect and copy judicial records and documents.
5 *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (citation omitted).
6 Such records are presumptively publicly accessible. *Id.* Consequently, a party seeking to seal a
7 judicial record “bears the burden of overcoming this strong presumption.” *Id.* “A ‘good cause’
8 showing under Rule 26(c) will suffice to keep sealed records attached to non-dispositive
9 motions.” *Id.* at 1180 (citing *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135–
10 36 (9th Cir. 2003)). However, “[t]hose who seek to maintain the secrecy of documents
11 attached to dispositive motions [and related materials] must meet the high threshold of showing
12 that ‘compelling reasons’ support secrecy.” *Id.* Compelling reasons exist when “such court
13 files might have become a vehicle for improper purposes, such as the use of records to gratify
14 private spite, promote public scandal, circulate libelous statements, or release trade secrets.” *Id.*
15 at 1178 (internal quotations and citations omitted). Furthermore, compelling reasons must be
16 “supported by specific factual findings,” that outweigh the traditional right of public access. *Id.*
17 at 1178–79 (citations omitted).

18 Here, Defendant seeks to seal a dispositive motion and related materials—namely, its
19 Motion for Summary Judgment, (ECF No. 8); its Reply in Support of its Motion for Summary
20 Judgment, (ECF No. 27); and its Response to Plaintiff's Motion for Rule 56(d) Discovery,
21 (ECF No. 28). Defendant also seeks to seal the MTO Lease, submitted as Exhibit B to its
22 Motion for Summary Judgment; and the lease creating Makers & Finders Coffee's tenancy,
23 submitted as Exhibit C to its Motion for Summary Judgment. (*See* MTO Lease, Ex. B to MSJ,
24 ECF No. 9); (Westmill Lease, Ex. C to MSJ, ECF No. 9). As such, Defendant must provide the
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1 Court with compelling reasons supported by specific factual findings, that outweigh the
2 traditional right of public access. *Kamakana*, 447 F.3d at 1178.

3 In its Motions to Seal, Defendant summarily asserts that “compelling reasons” support
4 the sealing of the above-mentioned filings because the leases “specifically provide that the
5 terms of the leases are confidential.” (Mot. to Seal MSJ 3:16–17, ECF No. 7); (Mot. to Seal
6 Reply and Resp. 3:18–19, ECF No. 24). Thus, Defendant argues that the leases, and documents
7 quoting the leases should be sealed. Nevertheless, Defendant provides no further explanation,
8 and thus fails to show compelling reasons supported by specific factual findings, that outweigh
9 the traditional right of public access. Accordingly, Defendant’s Motions to Seal, (ECF Nos. 7,
10 24), are **DENIED**.

11 **C. Subject Matter Jurisdiction**

12 Federal courts are courts of limited jurisdiction, possessing only those powers granted by
13 the Constitution and by statute. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir. 2008)
14 (citation omitted). For this reason, “[i]f at any time before final judgment it appears that the
15 district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. §
16 1447(c). Additionally, court may raise the question of subject matter jurisdiction *sua sponte* at
17 any time during the action. Fed. R. Civ. P. 12(h)(3); *Snell v. Cleveland, Inc.*, 316 F.3d 822, 826
18 (9th Cir. 2002).

19 District courts have jurisdiction in two instances. First, district courts have subject
20 matter jurisdiction over civil actions that arise under federal law. 28 U.S.C. § 1331. Second,
21 district courts have subject matter jurisdiction over civil actions where no plaintiff is a citizen
22 of the same state as a defendant and the amount in controversy exceeds \$75,000. 28 U.S.C.
23 § 1332(a). “Removal statutes are to be ‘strictly construed’ against removal jurisdiction. *Nevada*
24 *v. Bank of America Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (quoting *Syngenta Crop Prot., Inc.*
25 *v. Henson*, 537 U.S. 28, 32 (2002)). Furthermore, “[a] party invoking the federal court’s

1 jurisdiction has the burden of proving the actual existence of subject matter jurisdiction.”

2 *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996).

3 Here, Defendant removed the instant action based solely on diversity of citizenship
4 pursuant to 28 U.S.C. § 1332(a)(1). (Notice of Removal ¶¶ 4–8, ECF No. 1). Thus, it is
5 Defendant’s burden to show that the parties are completely diverse. To that end, Defendant
6 indicates that it is a limited partnership and that “[n]o defendant is a citizen of Nevada.
7 [Defendant] is an entity created pursuant to the laws of the State of Delaware with its principal
8 place of business located in Dallas, Texas.” (Removal Statement ¶ 3, ECF No. 11); (*see also*
9 Notice of Removal ¶ 5). Defendant further states that Plaintiff is a limited liability company
10 and “is an entity created pursuant to the laws of the State of Nevada with its principal place of
11 business located in Nevada.” (Removal Statement ¶ 3).

12 However, for purposes of diversity jurisdiction, a limited partnership is a citizen of all of
13 the states of which its partners are citizens, and a limited liability corporation “is a citizen of all
14 of the states of which its owners/members are citizens.” *See Johnson v. Columbia Props.*
15 *Anchorage, LP*, 437 F.3d 894, 899 (9th Cir.2006); *see also Carden v. Arkoma Assocs.*, 494 U.S.
16 185, 110 (1990). Because Defendant has only identified the state where each entity was
17 created, and each entity’s principal place of business, Defendant has not satisfied its burden of
18 proving the actual existence of subject matter jurisdiction.

19 Accordingly, the Court orders Defendant to show cause as to why the Court should not
20 remand this action to Clark County District Court for failure to satisfy the diversity jurisdiction
21 requirements set forth in 28 U.S.C. § 1332. Specifically, Defendant must provide the
22 citizenships of each of its members, and if any of those members are themselves limited
23 liability companies, partnerships, or other types of unincorporated associations, Defendant must
24 provide their citizenships as well. *See Colombia Props. Anchorage, LP*, 437 F.3d at 899.
25 Similarly, Defendant must provide the citizenships of each of Plaintiff’s partners, and if any of

1 those partners are themselves limited liability companies, partnerships, or other types of
2 unincorporated associations, Defendant must provide their citizenships as well. *See id.*
3 Defendant shall have fourteen days from the entry of this Order, to file a brief, not to exceed
4 ten pages, demonstrating that the Court has subject matter jurisdiction over this action. Failure
5 to comply with this Order will result in this case being remanded to Clark County District
6 Court.

7 Further, if Plaintiff wishes to address the jurisdictional issues implicated by this Order,
8 Plaintiff shall have fourteen days from the entry of this Order, to file a brief, not to exceed ten
9 pages, discussing the concerns herein raised.

10 **III. CONCLUSION**

11 **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment, (ECF
12 Nos. 4, 8), is **DENIED** without prejudice as premature.

13 **IT IS FURTHER ORDERED** that Plaintiff's Countermotion for Rule 56(d) Discovery,
14 (ECF No. 18), is **GRANTED**.

15 **IT IS FURTHER ORDERED** that Defendant's Motion to Redact and Seal, (ECF No.
16 7), and Motion for Leave to File Redacted Reply and Response, (ECF No. 24), are **DENIED**.
17 All documents filed under seal shall be immediately unsealed by the Clerk.

18 **IT IS FURTHER ORDERED** that Defendant shows cause as to why the Court should
19 not remand this action to Clark County District Court for failure to satisfy the diversity
20 jurisdiction requirements set forth in 28 U.S.C. § 1332. Specifically, Defendant must provide
21 the citizenships of each of its members, and if any of those members are themselves limited
22 liability companies, partnerships, or other types of unincorporated associations, Defendant must
23 provide their citizenships as well. Similarly, Defendant must provide the citizenships of each
24 of Plaintiff's partners, and if any of those partners are themselves limited liability companies,
25 partnerships, or other types of unincorporated associations, Defendant must provide their

citizenships as well. Defendant shall have fourteen days from the entry of this Order, to file a brief, not to exceed ten pages, demonstrating that the Court has subject matter jurisdiction over this action. Failure to comply with this Order will result in this case being remanded to the Eighth Judicial District Court.

IT IS FURTHER ORDERED that if Plaintiff wishes to address the jurisdictional issues implicated by this Order, Plaintiff shall have fourteen days from the entry of this Order, to file a brief, not to exceed ten pages, discussing the concerns herein raised.

DATED this 19 day of March, 2019.

Gloria M. Navarro, Chief Judge
United States District Court